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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 906

BARTOLO LUBINI,

Petitioner,

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

BARTOLO LUBINI,

Petitioner,

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the District of Columbia Circuit affirming a judgment of the United States District Court for the District of Columbia dismissing petitioner's complaint.

Opinions Below

The opinion of the District Court is unreported and is set forth at page 18 of the Appendix. The opinion of the Court of Appeals is not yet reported and is set forth at page 17 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on January 9, 1958. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented

1. Where the United States is a signatory to a Treaty of Peace with Italy, constituting Trieste as a Free Territory (Treaty of Peace with Italy, 61 Stat., Part 2, 1245, 1380) and neither the District Court nor the Immigration Service considered Trieste as a city in Italy in reviewing petitioner's two applications for adjustment of his immigration status to that of a permanent resident pursuant to 50 U.S.C., App. 1953 [Displaced Persons Act of 1948] and 197(d) [Refugee Relief Act of 1953], may the Court of Appeals substitute its judgment for that of the Executive authorities and find for the first time, on petitioner's appeal, that Trieste is not a Free Territory but a city in Italy?

2. Did the Court of Appeals err in not regarding itself bound by the determination of the Executive Branch that Trieste is a Free Territory, that it is not a city in Italy, and that Italy merely exercises civil administration over a part of Trieste, known as Zone A?

3. Where it was held administratively that petitioner could return to Trieste and his first application to adjust his immigration status, under 50 U.S.C., App. 1953 (Displaced Person's Act of 1948), was denied upon that ground, and the District Court found that this was error because Trieste is a city and not a country, was it proper upon petitioner's appeal and without any administrative or District Court determination on the issue, for the Court of Appeals to find that Trieste is a city in Italy?

4. Where the District Court held that petitioner's second application to adjust his status under 50 U.S.C., App. 1971(d) [Refugee Relief Act of 1953] was properly denied on the ground that he is a citizen of Italy and it does not clearly appear from the administrative decision that petitioner is in fact a citizen of Italy and the Court of Appeals ruled that his nationality is undetermined, was it proper for

the Court of Appeals to sustain the administrative decision upon a ground not urged administratively or below, i.e., that petitioner could return to Trieste and that Trieste is a city in Italy rather than that he is presently a citizen of Italy?

5. Whether the Court of Appeals may properly substitute the word "and" in place of the word "or" in statutes which are remedial in nature so as to bar relief to the petitioner, who is conceded to be a native of Yugoslavia, a resident of Trieste, the status of which is in question, and whose nationality is held to be undetermined.

Statutes, Treaties and International Agreements Involved

The Displaced Persons Act of 1948, as amended, 62 Stat. 1011 (50 U.S.C. App. 1953), authorizes adjustment of status of aliens to permanent residence for displaced persons in the United States. It provides:

> "Sec. 4(a) Any person who (1) entered the United States prior to April 30, 1949, and was on that date in the United States . . . and (2) is otherwise admissible under the immigration laws, and (3) is a displaced person residing in the United States as defined in this section, may within two years next following the effective date of this Act, as amended, apply to the Attorney General for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all facts and circumstances of his case, determine . . . that such alien is qualified under the provisions of this section, the Attorney General shall report to the Congress all the pertinent facts in the case . . ."[1]

[1] Upon Congressional approval of the Attorney General's order, permanent residence is granted to the alien.

"(b) When used in this section the term 'Displaced Person residing in the United States' means a person who establishes . . . that he is a person displaced from the country of his birth or nationality or of his last residence as a result of events subsequent to the outbreak of World War II."

The Refugee Relief Act of 1953 (67 Stat. 403, 50 U.S.C. App. 1971(d) authorizes similar adjustment for a person who is:

". . . unable to return to the country of his birth, or nationality or last residence because of persecution or fear of persecution on account of race, religion, or political opinion . . ."

The Treaty of Peace with Italy, 61 Stat., Part 2, 1245, Treaties and other International Acts Series 1648,
Article 19, Page 1379 provides:

"Italian citizens who were domiciled on June 10, 1940, on territory transferred by Italy to another State under the present Treaty and their children born after that date, shall, except as provided in the following paragraph, become citizens with full civil and political rights of the State to which the territory is transferred, in accordance with legislation to that effect to be introduced by that State within three months from the coming into force of the present Treaty.

Section 3, Page 1380 provides:

"FREE TERRITORY OF TRIESTE

"1. There is hereby constituted the Free Territory of Trieste, consisting of the area between the Adriatic Sea and the boundary defined in Articles 4 and 22 of the present Treaty. The Free Territory of Trieste is

recognized by the Allied and Associated Powers and by Italy, which agree that its integrity and independence shall be assured by the Security Council of the United Nations.

"2. Italian sovereignty over the area constituting the Free Territory of Trieste, as above defined, shall be terminated upon the coming into force of the present Treaty.

* * * * * * *

"4. The Free Territory of Trieste shall not be considered as ceded territory within the meaning of Article 19 and Annex 14 of the present Treaty."

Annex 6 at Page 1430 provides:

"1. Italian citizens who are domiciled on June 10, 1940, in the area comprised within the boundaries of the Territory of Trieste . . . shall become original citizens of the Free Territory fixed with full civil and political rights. Upon becoming citizens of the Free Territory they shall lose their Italian Citizenship.

"2. The Government of the Free Territory shall, however, provide that the persons referred to in Paragraph 1 over the age of 18 years . . . whose customary language is Italian, shall be entitled to opt his Italian citizenship within six months from the coming into force of the constitution under conditions to be laid down there. Any person so opting shall be considered to have reacquired Italian citizenship . . ."

The Memorandum of Understanding between the Governments of Italy, the United Kingdom, the United States, and Yugoslavia Regarding the Free Territory of Trieste, Treaties and Other International Acts Series 3099, provides:

"2. As soon as this Memorandum of Understanding has been initialled and the boundary adjustments provided by it have been carried out, the Governments of the United Kingdom, the United States and Yugoslavia will terminate military government in Zones A and B of the Territory. The Governments of the United Kingdom and the United States will withdraw their military forces from the area north of the new boundary and will relinquish the administration of that area to the Italian Government. The Italian and Yugoslav Governments will forthwith extend their civil administration over the area for which they will have responsibility."

Statement

Petitioner is an alien who was admitted to the United States as a seaman in 1946. In 1952, he filed an application to adjust his status to that of a permanent resident pursuant to the provisions of Section 4 of the Displaced Persons Act of 1948, as amended, 62 Stat. 1011 (1948), 50 U.S.C. App. 1953 (1952). To be eligible for such an adjustment, an applicant must show that he was "displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II." *Ibid.*

Petitioner's place of birth is Briani in the Province of Pola and has had three sovereignties in his lifetime (R. 40). At the time of petitioner's birth, prior to World War I, it was Austrian. Armistice Convention with Austria-Hungary, Article 70 (November 3, 1918, S. Doc. 348, 67th Cong., 4th Sess., 3178 (1923). Between the wars it was Italian, *ibid.* Since 1947, it has been Yugoslav. Italian Peace Treaty, Treaties and Other International Acts Series 1648; 61 Stat., Part 2, 1245, Annex I.

Notwithstanding the uncontroverted fact regarding the place of petitioner's birth, which establishes that the

country of birth is Yugoslavia,[2] the Immigration and Naturalization Service found that the petitioner was a native of Austria (R. 41).

The Service found that the petitioner was "last a citizen of Italy", but made no finding with regard to the country of petitioner's present nationality (R. 41). Evidence in the administrative record contained testimony that the petitioner did not know the country of his nationality (Ex. 2, Deportation Hearing); that he did not opt Italian citizenship after World War II (Deportation Minutes) Cf. Italian Peace Treaty, op. cit., Article 19, Annex VI, Article 6); and that he was not a citizen of any country at the time of his hearing; that he had arrived in the United States on a certificate to travel as a seaman, issued by the "authorities at Fiume" (Displaced Persons Minutes); that at the age of 21 in 1931 he had served in the Italian Army for 24 months (Displaced Persons Minutes); and that during World War II he served in the Italian merchant marine (R. 40). A prior administrative decision, made in deportation proceedings against the petitioner, was also incorporated into the record. By that finding petitioner was held to be "last a citizen of Italy, present nationality undetermined" (Deportation decision of Henry Millman of October 8, 1951).

The Immigration Service made no finding as to the country of petitioner's last residence (R. 41). A finding was made that the petitioner was "last a resident of Trieste" and that he "cannot establish that he is unable to return to Trieste, because of fear of persecution on account of race, religion, or political opinions." Upon the basis of this finding, the petitioner was found to be ineligible for adjustment of his immigration status as a dis-

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[2] It is beyond dispute that petitioner's place of birth, Briani, is now under Yugoslav sovereignty. For immigration purposes, the country of birth is the country in which alien's place of birth is at the time of the Administrative Proceedings. *U.S. ex rel. Mensevitch* v. *Tod*, 264 U.S. 134.

placed person residing in the United States (R. 41; Appendix, p. 26).

A complaint was thereafter filed by the petitioner in the United States District Court for the District of Columbia for a declaratory judgment that the petitioner is eligible for such adjustment.

While the action was pending in the District Court, petitioner filed a second application for adjustment of his status under Section 6 of the Refugee Relief Act of 1953, as amended, 67 Stat. 403 (1953), 50 U.S.C. App. 1971(d) (1954), which succeeded the Displaced Persons Act.

A hearing was accorded the petitioner on that application but no transcript was kept of it. The application was denied upon the basis of an administrative decision which contains no express findings on the issues of the country of birth, residence, or nationality, but does contain a conclusion that the petitioner "is able to return to the country of his nationality" (R. 42-43, Appendix, p. 29). The decision indicates that the petitioner testified he did not "take up residence in Trieste until about 1942" (R. 42). In addition to the petitioner's testimony, the special inquiry officer considered an *ex parte* communication from the Consul General of Italy at New York in which the Service was advised, contrary to the petitioner's testimony, that he had "established his residence in Trieste in May, 1940" (R. 42). No finding was made by the Service on the question of the petitioner's domicile, the issue which controlled his nationality (Cf. Article 19, 21, and Annex VI, Article 6, Treaty of Peace with Italy, 61 Stat., Part 2, 1245, 1379, 1380, 1381, 1430, Treaties and Other International Acts Series 1648). The denial of the petitioner's application was posited expressly on the *ex parte* representation of the Italian Consul General that as petitioner was a "permanent resident (sic) of Trieste on June 10, 1940, no option (to elect nationality) was required in his

case", notwithstanding provisions in the Treaty which permit opting of citizenship for persons domiciled in Trieste and in ceded areas. Cf. Article 19, and Annex VI, Article 6 of Treaty of Peace, op. cit., 1380, 1430.

Following the denial of petitioner's application for adjustment of status under the Refugee Relief Act, the complaint pending in the District Court was amended to seek a declaratory judgment that petitioner is eligible for such adjustment under that Act and that he may not be denied such adjustment upon the ground that he is a national of Italy (R. 7).

The District Court declared that the ground upon which the petitioner's Displaced Persons application was denied:

> "does not meet the requirements of the statute, because as the statute provides, the question is not whether the alien is likely to be persecuted in any particular city but in a specified country." (R. 36)

However, the denial of the Displaced Persons Act application was held to be immaterial because the "Immigration and Naturalization Service also found that the alien is a citizen of Italy" and that "this finding is sustained by substantial evidence" (R. 36). Compare with findings (R. 41, 42, 43).

On the issue of reliance upon the *ex parte* letter to support a conclusion that the petitioner is able to return to the country of his nationality, the trial court indicated that it had "grave doubts whether there should not have been an opportunity to submit evidence on this issue" (R. 30). It nevertheless ruled upon the issues upon the merits without remanding the matter for further hearings and it held that the evidence was substantial (R. 36). Petitioner appealed. The Government filed no cross appeal.

The Court of Appeals for the District of Columbia Circuit declared that it does "not subscribe to all that is

said either in the District Court's memorandum opinion or in the decisions of the Immigration and Naturalization Service . . ." It ruled, however, that "a review of the record leads inescapably to the conclusion that appellant's last residence was in Italy in the city of Trieste" and that "it is plain that neither on his Displaced Persons Act application nor on his Refugee Relief Act application has appellant carried his burden of showing that he will be subject to persecution 'on account of race, religion, or political opinion' in the country of his birth (Yugoslavia), *and* in the country of his nationality (undetermined), *and* in the country of his last residence (Italy)". (Emphasis supplied) (R. 45, 46).

Reasons for Granting the Writ

1. In the decision below the Court of Appeals made a finding not made by the Service or by the District Court that the country of petitioner's last residence was Italy. The Service had made no finding regarding the country of residence, but merely that the place of last residence was Trieste; the District Court had ruled that this finding did not meet the requirements of the statute.

The finding so made by the Court of Appeals presents important questions regarding the role of the courts in matters affecting international relations.

The finding that residence in Trieste is residence in Italy is in conflict with two determinations by the Executive Branch in its conduct of foreign affairs. The Treaty of Peace with Italy, 61 Stat., Part 2, 1245, 1380 (1947), Treaties and Other International Acts Series 1648, established Trieste as a Free Territory with attributes of sovereignty including the power to extend citizenship to its domiciliaries. See Annex VI, Article 6, 1430. The terms of this treaty clearly bar any judicial ruling that Trieste is a city in Italy.

In 1954, the Executive entered into a "Memorandum of Understanding Between the Governments of Italy, the United Kingdom, and Yugoslavia Regarding the Free Territory of Trieste", Treaties and Other International Acts Series 3099. The Memorandum expressly provides:

> "The Italian and Yugoslav Governments will forthwith extend their *civil administration* over the area for which they will have responsibility." (Zones A and B of the Territory.) (Emphasis supplied.)

The extension of Italy's civil administration to a portion of Trieste cannot be interpreted to incorporate Trieste geographically into Italy, or to be a repudiation of the Treaty provisions. Memorandum, paragraphs 1 and 2. By rendering a judicial finding that Trieste is a city in Italy, the Court of Appeals is in conflict with the well-established principal that the courts will not interfere with determinations of the Executive Branch relating to foreign affairs. *Chicago and Southern Airlines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111-113; *United States* v. *Belmont*, 301 U.S. 324, 330; *United States* v. *Curtiss-Wright Corporation*, 299 U.S. 304, 315-322; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302; *Jones* v. *United States*, 137 U.S. 202, 212.

Moreover, the Court of Appeals deviated from the position which it adopted in *Rasmussen* v. *Brownell*, 98 App. D.C. 300, 235 F. 2d, 527 (1956), dismissed by stipulation, 355 U.S. 859; and its present ruling is in conflict with the Ninth Circuit's decision in *Bussoz* v. *United States*, 218 F. 2d, 683, 686-687, certiorari denied, 350 U.S. 824.

2. The issue whether the courts may make determinations regarding the political status of foreign places is of recurring importance in the administration of the immigration laws. Thus, admissibility of an immigrant alien to the United States is predicated upon possession of a visa chargeable to a fixed quota of immigrants from each independent

country, self-governing dominion, or territory. See Sections 202 and 211 of the Immigration and Nationality Act of 1952, 66 Stat. 176, 181; 8 U. S. C. 1152, 1181. Whether an immigrant alien is from Trieste, if a territory, or from Trieste, if a city in Italy, not only determines his admissibility into the United States, depending upon the availability of a quota number, but may render him deportable if he has been previously admitted under an erroneous determination of his quota area. Sections 241(a)(1), 212(a) 20, and 211(a), 66 Stat. 204, 182, 181; 8 U.S.C. 1251(a)(1), 1182(a)(20), 1181(a).

That petitioner's argument is not speculative appears from the fact that the President has in fact determined that Trieste is a Free Territory rather than a city in Italy and has allocated a quota for immigration from that area apart from the quota established for Italy. Presidential Proclamation 2980, 17 Fed. Reg. 6019; 8 U.S.C.A. 1151 Note. Inasmuch as rulings by the Attorney General with respect to all questions of law are controlling, Section 103(a) of the Immigration and Nationality Act, 66 Stat. 173, 8 U.S.C. 1103, all immigrant aliens who have been admitted from Trieste may well become deportable if the decision below is to be followed.

The question is also important in the enforcement of Section 243(a) of the Act, 66 Stat. 212, 8 U.S.C. 1253(a), which provides for deportation, inter alia, to any country from which a deportable alien last entered the United States, or in which the port of embarkation is located, or in which he had prior residence. An ethnic Slovene or Croat who departed Trieste for the United States under the ruling of the court below would be deportable to Italy, a country where he has had no nationality, no residence, and no attachment by language or culture.

3. The decision below is also in conflict with a fundamental rule of administrative law enunciated by this court in *Sc-*

curities Exchange Commission v. *Chenery Corp.*, 318 U.S. 80; 332 U.S. 194, 197, namely, that a reviewing court must judge the propriety of the administrative action "solely upon the grounds invoked by the agency".

The court below stated expressly that it did not "subscribe to all that is said . . . in the decisions of the . . . Service on the (petitioner's) applications for relief" (R. 45). An analysis of its opinion indicates that its points of disagreement are on the precise grounds relied upon by the administrative agency for its decision. In each case, in effect, the Court of Appeals supplied its own ground for sustaining a denial of the application.

In the first application, under the Displaced Persons Act, the Court of Appeals chose a ground offered for the first time in that court. The agency action was based solely upon a finding that the petitioner could return to Trieste, without reference to petitioner's country of last residence and without reference to Trieste as a country or as a city in Italy (R. 41). In the District Court the defendant below relied exclusively upon the administrative decision (Answer R. 2, 3; Pre-Trial Memorandum R. 5, 6; Transcript R. 15 et seq.). Not until the case reached the Court of Appeals did the defendant-appellee below suggest that residence in Trieste is residence in Italy (Appellee's Brief, pp. 13, 14).

In the second application, under the Refugee Relief Act, the Court of Appeals expressly disavowed the finding of the Service, and of the District Court, that the country of petitioner's nationality is Italian by holding that it was "undetermined" (R. 46).

No administrative determination was ever made that petitioner failed to establish inability to return to Yugoslavia. The Court of Appeals, nevertheless, based its decision on this ground. If petitioner's nationality is undetermined or if he is stateless, he cannot return to the country of his citizenship. No administrative determination was in

fact made as to his citizenship. The District Court found that petitioner is a citizen of Italy and that an administrative determination to this effect was in fact made. The Court of Appeals found, on the contrary, that petitioner's citizenship was undetermined [3] and substituted its view that petitioner did not establish inability to return to this undetermined country. Finally, no administrative or District Court finding was made that petitioner was last a resident of Italy. Nevertheless, the Court of Appeals made a finding to this effect.

The departure of the Court of Appeals from the elemental rule of administrative law set forth in the *Chenery* decision poses a question of obvious and paramount importance for courts which are continuously reviewing decisions of administrative agencies.

4. The decision of the Court of Appeals violated a basic rule of statutory construction, which assumes an especial importance in the interpretation and administration of remedial immigration laws. It is axiomatic that remedial legislation is to be given a liberal construction in aid of its

[3] In the deportation proceedings Hearing Officer Millman found that petitioner's present nationality was undetermined in his opinion of October 8, 1951. On appeal, the Assistant Commissioner and the Board of Immigration Appeals stated, as had Millman, that petitioner was last a citizen of Italy. In the Displaced Persons proceedings it was likewise found that petitioner was last a citizen of Italy but no finding was made as to his present nationality. Similarly, no finding was made as to present nationality in the Refugee Relief Act decision (Appendix, p. 20). We believe that it was assumed, administratively, without any factual support, in the Refugee Relief Act decision that petitioner was a citizen of Italy and that this might have been the basis for the decision. However, "a court cannot be expected to chisel that which must be precise from what the agency has left vague and undecisive", *Securities Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196-197. The case should have been remanded to the Immigration Service, as petitioner urged below, for clarification of the Refugee Relief Act decision. Instead, the District Court and the Court of Appeals substituted their own opinions reaching opposite conclusions. The District Court ruled that petitioner was presently a citizen of Italy, the Court of Appeals disagreed and concluded that petitioner was last a resident of Italy.

purposes. Yet the court below not only adopted a restrictive construction but in so doing substituted the conjunction "and" in place of the legislative's use of the word "or".

The pertinent statutes authorize adjustment where there has been displacement from an alien's "country of his birth, *or* nationality, *or* of his last residence." (Emphasis supplied.) 62 Stat. 1011 (1948), 50 U.S.C. App. 1953 (1952), 67 Stat. 403 (1953), 50 U.S.C. App. 1971(d) (1954).

The court below substituted the word "and" in place of "or" (R. 46) and ruled that to be eligible for adjustment of status, appellant must show inability to return to his country of birth and nationality and last residence.

This interpretation contradicts the plain grammatical meaning of the language used and the basic rules of statutory construction.

(a) It is a cardinal rule of statutory interpretation that the word "or" has to be given its normal disjunctive meaning. This rule is departed from only if such a construction would render the provision in question repugnant to other provisions of the statute. *Gay Union Corp.* v. *Wallace*, 71 App. D.C. 382, 112 F. 2d, 192 (1940), cert. denied, 310 U.S. 647; *In re Rice*, 83 U.S. App. D.C. 26, 165 F. 2d, 617 (1947); *Ohio Fuel Supply Co.* v. *Paxton*, 1 F. 2d, 662 (S.D. Ohio, 1924), affirmed 11 F. 2d, 740.

(b) The statute is remedial. (H. Rept. 1323, 83d Cong., 2d Sess., p. 10.) *Shio Han Sun* v. *Barber*, 144 F. Supp. 850 (D.C. Calif. 1956). It is therefore to be given a construction which would favor adjustment of status rather than a strict construction to the contrary. *Shio Han Sun* v. *Barber*, *supra*.

Since the statute uses the word "or" the disjunctive meaning is clearly indicated. Therefore, appellant is a displaced person within the meaning of the statute if he is displaced from either (1) the country of his birth (2) the country of his nationality, or (3) the country of his last residence.

Conclusion

The questions of the proper role of the courts in making determinations which affect the conduct of foreign affairs and in reviewing the decisions of administrative agencies are of manifest and continuing importance. Inasmuch as the decision below poses such questions, a review of that decision is warranted by this court. The proper construction to be placed upon a remedial immigration statute similarly is one of continuing importance in the administration of the immigration and nationality laws. For these reasons, a writ of certiorari should be granted.

Respectfully submitted,

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Filed January 9, 1958. Joseph W. Stewart, Clerk

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,854

BARTOLO LUBINI, APPELLANT

v.

HERBERT BROWNELL, JR., Attorney General of the UNITED STATES, APPELLEE

Appeal from the United States District Court for the District of Columbia

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Decided January 9, 1958

Mr. David Carliner, with whom *Mr. Jack Wasserman* was on the brief, for appellant.

Mr. John W. Kern, III, Assistant United States Attorney, with whom *Messrs. Oliver Gasch*, United States Attorney, *Lewis Carroll*, Assistant United States Attorney, and *Milton Eisenberg*, Assistant United States Attorney at the time brief was filed, were on the brief, for appellee.

Before FAHY, WASHINGTON and BASTIAN, Circuit Judges.

PER CURIAM: This is an appeal by an alien from the dismissal of his complaint seeking a declaration that he is eligible for relief from deportation under § 4 of the Displaced Persons Act of 1948[1] or under § 6 of the Refugee

[1] 62 STAT. 1011 (1948), as amended, 50 U.S.C.APP. § 1953 (1952).

"§ 4 (a) Any alien who (1) entered the United States prior to April 30, 1949, and was on that date in the United States . . . and (2) is otherwise admissible under the immigration laws, and (3) is a displaced person residing in the United States as defined in this section, may within two years next following the effective date of this Act, as amended, apply to the

Relief Act of 1953.[2] Appellant's deportability is not in dispute.

We do not subscribe to all that is said either in the District Court's memorandum opinion or in the decisions of the Immigration and Naturalization Service on appellant's applications for relief. But a review of the record leads inescapably to the conclusion that appellant's last residence was in Italy in the city of Trieste. Appellant's testimony in the deportation hearings in 1951 and in the hearing on his Displaced Persons Act application in 1952 establishes that he left his home in Briani in 1939, and that his permanent home between 1939 and 1946 was in Trieste; appellant's wife and child still live in Trieste. Accordingly, we think it plain that neither on his Displaced Persons Act application nor on his Refugee Relief Act application has appellant carried his burden of showing that he will be subject to persecution "on account of race, religion, or political opinion" in the country of his birth (Yugoslavia), and in the country of his nationality (undetermined), and in the country of his last residence (Italy).

Affirmed.

MEMORANDUM

This is an action for a declaratory judgment to review orders of the Attorney General denying applications of the plaintiff for a status of a permanent resident in the United States under the Displaced Persons Act of 1948, and the Refugee Relief Act of 1953.

Attorney General for an adjustment of his immigration status. If the Attorney General shall, upon consideration of all facts and circumstances of his case, determine . . . that such alien is qualified under the provisions of this section, the Attorney General shall report to the Congress all the pertinent facts in the case. . . .

"(b) When used in this section the term 'Displaced Person residing in the United States' means a person who establishes . . . that he is a person displaced from the country of his birth or nationality or of his last residence as a result of events subsequent to the outbreak of World War II."

[2] 67 STAT. 403 (1953), as amended, 50 U.S.C.APP. § 1971d (1954), authorizing similar adjustment for a person who is ". . . unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion. . . ."

The plaintiff is a native of Yugoslavia, but who lived for some years under the Austrian flag, and then under the Italian flag. His last place of abode in Europe was Trieste. He was a member of a crew on board a merchant vessel that anchored at Baltimore, in October 1946. Receiving shore liberty he lawfully entered the United States for a temporary stay. However, he failed to rejoin his ship, stayed in the United States in violation of law, and settled here. In due time he obtained permanent employment at a prominent restaurant in New York City, where he has been working as a butcher for some years. His employers speak highly of him. By hard application and thrift he has managed to accumulate savings aggregating $10,000 and has been planning to arrange for the immigration of his wife and children from Trieste to this country through lawful channels.

As was inevitable, he was finally located and apprehended by the Immigration authorities, and his deportation was ordered in 1951. The deportation order having been affirmed by higher authority in the Immigration and Naturalization Service, the plaintiff made an application under the Displaced Persons Act of 1948 (50 U. S. C. App. 1953) for an adjustment of his status for admission to permanent residence in the United States. This application was denied after a hearing. He then submitted another application for similar relief under the Refugee Relief Act (50 U. S. C. App. 1971(d)). This application was likewise denied. The purpose of the action now before the Court is to secure a review of these denials.

The pertinent provisions of each of the two last mentioned statutes authorize the Attorney General with the approval of a concurrent resolution of Congress, to grant the status of a permanent resident in the United States to any person who lawfully enters this country as a nonimmigrant and is unable to return to the country of his birth, or nationality, or last residence, because of persecution or fear of persecution on account of race, religion, or political opinion.

The plaintiff claimed that as a devout Roman Catholic he fears persecution if he were to return to Yugoslavia, because that country was under Communist domination.

The Immigration and Naturalization Service in denying the plaintiff's applications made findings to the effect that he was last a resident of Trieste, and he cannot establish that he is unable to return to Trieste, because of fear of persecution. The last mentioned finding does not meet the requirements of the statute, because, as the statute provides, the question is not whether the alien is likely to be persecuted in any particular city, but in a specified country. This matter, however, becomes immaterial in view of the following considerations.

The Immigration and Naturalization Service also found that the alien is a citizen of Italy. Whether he is, is a mixed question of law and fact. A review of the file leads to the conclusion that this finding is sustained by substantial evidence and, consequently, the Court may not set it aside, even though there is some evidence to the contrary. There is, of course, no contention that if deported to Italy the alien is likely to be persecuted.

It is claimed by counsel for the plaintiff that the statute should be construed as meaning that if the alien has reason to fear persecution either in the country of his birth, or in the country of his nationality, or in the country of his last residence, he should be admitted to permanent residence in the United States. While this contention is ingenious and possibly may be supported by a strict, literal, grammatical reading of the Section, it would defeat the obvious intent of Congress. The humane purpose of Congress was manifestly to prevent the return of a person to a country where he has reason to fear persecution. The Court is, therefore, of the opinion that the reasonable construction of the statute is that the alien is entitled to such relief only if he is unable to return either to the country of his birth, or to the country of his nationality, or to the country of his last residence because of fear of persecution. In this instance, he can return to the country of his nationality without fear of persecution.

In view of the foregoing considerations, the Court is unable to find any basis for setting aside the orders of the Immigration and Naturalization Service.

There is no doubt that this case involves sympathetic elements that have a strong appeal to feelings of humanity.

In his anxiety and impatience to secure the advantages of the free soil of America, the plaintiff entered this country in violation of law, which however involves no moral turpitude. He has proved to be a hardworking, thrifty individual and good material for future citizenship. To deport him even to Italy, where it may be difficult for him to secure employment and make a living under present economic conditions, involves a human tragedy. The Executive and Legislative branches of the Government alone, however, in the exercise of discretion can extend relief. The Courts are powerless to act since the scope of judicial review is limited and confined strictly to questions of law.

(S.) ALEXANDER HOLTZOFF,
United States District Judge.

February 14, 1957.

[Filed February 20, 1957]

ORDER

This matter having come on for trial and it appearing to the Court as disclosed by the opinion filed February 14, 1957 herein, which contains the findings of fact and conclusions of law, that the defendant is entitled to judgment, it is this 20th day of February 1957,

ORDERED that judgment be entered for the defendant and the complaint be and hereby is dismissed, and it is

FURTHER ORDERED that the order granting preliminary injunctive relief restraining the defendant from deporting this plaintiff pending the determination of this suit be and HEREBY IS DISSOLVED.

(S.) ALEXANDER HOLTZOFF,
Judge.

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FILED
MAY 9 1958
JOHN T. FEY, Clerk

No. 906

In the Supreme Court of the United States

OCTOBER TERM, 1957

BARTOLO LUBINI, PETITIONER,

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. 17-18) is reported at 251 F. 2d 28. The memorandum opinion of the District Court (R. 35-37;[1] Pet. 18-21) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1958 (R. 47). A petition for a writ of certiorari was filed on April 8, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The pagination of the record in this Court which consists of the Joint Appendix below and other papers of record in this Court will be designated by the symbol "R."; references to the appendix of the appellee below will be designated by the symbol "App.".

QUESTION PRESENTED

Whether an alien who had in 1939 left the place of his birth which is presently part of Yugoslavia, had established a home in Trieste from 1939 to 1946, and had entered this country in 1946 as an Italian resident was eligible for adjustment under the Refugee Relief Act or under the Displaced Persons Act on the ground that he feared persecution in Yugoslavia when admittedly he can be deported to Italy as the country of his last residence.

STATUTES INVOLVED

Section 4 of the Displaced Persons Act of 1948, as amended (62 Stat. 1011, 64 Stat. 224; 66 Stat. 277, 50 U.S.C. App. 1953) provides:

> (a) Any alien who (1) entered the United States prior to April 30, 1949, and was on that date in the United States, or if he was temporarily absent from the United States on that date for the reasons which, in accordance with regulations to be promulgated by the Attorney General, show special circumstances justifying such absence, and (2) is otherwise admissible under the immigration laws, and (3) is a displaced person residing in the United States as defined in this section may, within two years next following the effective date of this Act, as amended, apply to the Attorney General for an adjustment of his immigration status. * * *
>
> (b) When used in this section the term "Displaced Person residing in the United States" means a person who establishes that he lawfully entered the United States as a non-immigrant under section 3 or as a non-quota immigrant student

> under subdivision (e) of Section 4 of the Immigration Act of May 26, 1924, as amended, and that he is a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II; and that he cannot return to any of such countries because of persecution or fear of persecution on account of race, religion or political opinions.

Section 6 of the Refugee Relief Act of 1953, as amended (67 Stat. 403, 68 Stat. 1044, 50 U.S.C. App. (Supp. V) 1971d) provides in pertinent part:

> Any alien who establishes that prior to July 1, 1953, he lawfully entered the United States as a bona fide nonimmigrant and that he is unable to return to the country of his birth, or nationality, or last residence because of persecution or fear of persecution on account of race, religion, or political opinion, or who was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status. * * *

STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals (R. 47) affirming the dismissal by the District Court for the District of Columbia of his complaint for declaratory and injunctive relief from orders entered in immigration proceedings denying him adjustment of his nonimmigrant status to that of a permanent resident pursuant to Section 4 of the Displaced Persons Act of 1948 (62 Stat. 1011, as amended, 50 U.S.C. App. 1953, *supra*) and under Section 6 of the Refugee

Relief Act of 1953 (67 Stat. 403, as amended, 50 U.S.C. App. (Supp. V) 1971, *supra*) (Pet. 18-21).

Petitioner was born in 1910 in Briani which was then a part of Austria but which, between World War I and World War II, became a part of Italy, and after 1947, a part of Yugoslavia (R. 40). In 1939, when Briani was still Italian, petitioner moved to Trieste and remained a resident of Trieste from 1939 to 1946, during all of which time Trieste was part of Italy (R. 40). During the war years petitioner was a sailor in the Italian Merchant Marine, traveling between all the ports of Italy (R. 40; App. 34, 39). In 1946 he spent a month in Briani on a visit, having been given a pass to go there from Trieste by Italian and Yugoslav authorities (App. 34). On October 23, 1946, petitioner arrived in the United States at Baltimore, Maryland, on an Italian ship and in possession of an Italian seaman's book. He deserted his ship and remained in this country illegally (R. 40-41; App. 35, 39-40). On February 10, 1947, pursuant to the Treaty of Peace with Italy, the city and territory of Trieste became a free territory (61 Stat. (pt. 2) 1247, 1380-1382).

A. The various proceedings before the Immigration and Naturalization Service may be summarized as follows:

1. Deportation proceedings were instituted against petitioner on October 4, 1951 (App. 17-18). At the hearing petitioner stated that he was last a citizen of Italy; that Trieste was his "permanent home" until 1946, when he came to the United States; that his wife and child are still living in Trieste; and that his wife's nationality is also Italian (App. 19, 24, 27, 38, 42). He stated that he had never been a citizen or subject of any

country other than Italy (App. 19). Petitioner offered no evidence tending to establish that he was not deportable, and he was, accordingly, ordered deported (App. 24-27). On January 5, 1952, the Board of Immigration Appeals granted a right of voluntary departure provided petitioner should depart within 60 days (App. 27-28). Petitioner did not depart and the deportation order was reinstated.

2. In August 1952, petitioner applied for adjustment of his nonimmigrant status to that of permanent resident under Section 4 of the Displaced Persons Act of 1948 (*supra*, pp. 2-3) which permits relief to "a person displaced from the country of his birth, or nationality, or of his last residence as a result of events subsequent to the outbreak of World War II" (*Ibid.*). At his hearing on August 5, 1952 (App. 28), petitioner testified that he had served in the Italian army for 24 months when he was 21, that he had been an Italian seaman, that he had come to the United States aboard an Italian vessel with Italian seaman's papers (App. 32, 34, 39). When asked of what country he was a citizen, petitioner replied (App. 33), "Not any country." He reiterated, however, that he had been living in Trieste from 1939 to 1946, had been married there, and that his child had been born there (App. 34). He testified that, although he made no official inquiry as to whether he would be able to return to Italy or Trieste, he did not think he could return to Trieste because his name had been cancelled on the population registry (App. 36-37). He also stated without explanation that (App. 37) "if I fall in the hands of the Yugoslavian Government I will be persecuted." He said he did not know what government was "ruling" Trieste "now" but he under-

stood that Yugoslavia claimed Trieste (App. 41).[2] He stated that the reason that he did not want to return to Briani, his birthplace, was that he did not like the Yugoslavian form of government (App. 37-38, 42). He admitted that, when he returned to Briani in 1946 for a month's visit, he was not persecuted (App. 38).

At the conclusion of this hearing, the hearing examiner found that petitioner was "a native of Austria and last a citizen of Italy"; that he "was last a resident of Trieste", and that he "cannot establish that he is unable to return to Trieste, because of fear of persecution on account of race, religion, or political opinions" (App. 44), and accordingly recommended denial of his application (App. 43, 45).

3. In December 1953, petitioner moved to reopen the deportation proceedings in order to apply for suspension of deportation under Section 244(a) of the Immigration and Nationality Act of 1952. On January 29,

[2] At the time of this hearing, the Free territory of Trieste was under the protection of the Security Council of the United Nations Organization as provided by the Italian Peace Treaty (see: 61 Stat. (pt. 2) 1247, 1429-1440 (Annex VI, Permanent Statute of the Free Territory of Trieste), 1440-1443 (Annex VII, Instrument for the Provisional Regime of the Free Territory of Trieste)), and was being administered by the allied forces. On October 5, 1954, a Memorandum of Understanding was entered into between the governments of Italy, the United Kingdom, the United States, and Yugoslavia, under which the military government would be terminated, and the two zones into which the Free Territory was divided would be civilly administered by Italy and Yugoslavia, respectively, with full guarantees of rights to both ethnic groups. See: "Memorandum of Understanding Between the Governments of Italy, the United Kingdom, the United States and Yugoslavia Regarding the Free Territory of Trieste", 5 United States Treaties and Other International Agreements (Part 3, 1954), pp. 2387-2389, and see Special Statute, entered into between Italy and Yugoslavia, *Ibid.*, pp. 2390-2393. The zone which includes the city of Trieste is within the area of Italian civil administration.

1954, this motion was denied by the Board of Immigration Appeals (App. 45, 46).

4. In March 1955, petitioner filed an application for adjustment of his status to that of permanent resident under Section 6 of the Refugee Relief Act of 1953 (*supra*) (App. 46). An examination was conducted on this new application by a special inquiry officer, who, after consideration, recommended its denial (App. 46-47). The special inquiry officer's report states that under date of March 18, 1954 the Consul General of Italy at New York advised the Immigration and Naturalization Service that it had been officially established that petitioner had established his residence in Trieste on May 19, 1940, "that as he was a permanent resident of Trieste on June 10, 1940, no option was required in his case", and that on April 2, 1954 the Consul General issued a travel document for petitioner's return to Italy (App. 47). The special inquiry officer recommended that petitioner's application for adjustment of status under the Refugee Relief Act of 1953 be denied (App. 47) "for the reason that he is able to return to the country of his nationality." On April 28, 1955, this recommendation was approved by the Regional Commissioner "upon consideration of the entire record" (R. 43).

B. On April 28, 1954 petitioner filed the complaint instituting the instant proceedings in the District Court for the District of Columbia alleging, *inter alia*, that he is a native of Yugoslavia, that he is a stateless person and not a citizen of Italy, that he was not last a resident of Trieste but that in any event Trieste is not a country within the meaning of the Displaced Persons Act. On argument in this action, petitioner's counsel conceded

that the claim of possible persecution would not apply if petitioner, in accordance with the deportation order, were deported to Italy (R. 24-26), and he also conceded that petitioner could legally be deported to Italy (R. 27). He took the position that petitioner was entitled to relief under the two statutes if he could show that he was displaced from either (1) his country of birth, or (2) his country of nationality or (3) his country of last residence. He also contended that, since Trieste is not a country, that free territory could not, under the findings of the Immigration and Naturalization Service in the proceedings under the Displaced Persons Act (*supra*, p. 6), be the place of his last residence within the meaning of the statute (R. 13-14).

In its memorandum opinion denying petitioner relief (R. 35-37), the district court held that, while Trieste was not a country within the terms of the statute, nevertheless, since the Immigration and Naturalization Service had found that petitioner is a citizen of Italy, he was not entitled to adjustment of status as a displaced person. The court construed Section 4 of the Displaced Persons Act (*supra*, pp. 2-3) to mean (R. 37) "that the alien is entitled to such relief only if he is unable to return either to the country of his birth, or to the country of his nationality, or to the country of his last residence because of fear of persecution", and observed that "[i]n this instance, he can return to the country of his nationality without fear of persecution."

In its opinion affirming the judgment of the district court, the Court of Appeals held as follows (Pet. 18):

> * * * a review of the record leads inescapably to the conclusion that appellant's last residence was

in Italy in the city of Trieste. Appellant's testimony in the deportation hearings in 1951 and in the hearing on his Displaced Persons Act application in 1952 establishes that he left his home in Briani in 1939, and that his permanent home between 1939 and 1946 was in Trieste; appellant's wife and child still live in Trieste. Accordingly, we think it plain that neither on his Displaced Persons Act application nor on his Refugee Relief Act application has appellant carried his burden of showing that he will be subject to persecution "on account of race, religion, or political opinion" in the country of his birth (Yugoslavia), and in the country of his nationality (undetermined), and in the country of his last residence (Italy).

ARGUMENT

In all the proceedings below, administrative and judicial, it was found as a fact that petitioner made his permanent home in Trieste between 1939 and 1946 at a time when Trieste indisputably was Italian. Hence, when petitioner came to the United States in 1946, he came from the country of Italy, just as he would have come from Italy had he left Rome or Naples. The holding of the Court of Appeals that the country of petitioner's last residence was Italy is thus not a ruling based upon facts not found by the administrative authorities. The Court of Appeals merely found it unnecessary to consider the validity of the legal conclusions as to petitioner's present nationality which had been drawn from the established facts since it properly found that it was enough that petitioner was not unable to return to the country of his last residence, Italy. And it was also unnecessary for the court to consider

the present status of Trieste since the country (not city) to which petitioner is to be returned is the *country* of his last residence, Italy.

For that reason the only question raised by petitioner which is really involved in this case is whether petitioner is entitled to adjustment of status if he can establish fear of persecution in any one of three places —(1) the country of his birth, (2) the country of his nationality or (3) the country of his last residence— even if he cannot establish a reasonable fear of persecution in the other two. Petitioner argues that he is entitled to consideration for relief if he would be persecuted in Briani, the place of his birth, which became part of Yugoslavia some seven years after he moved away in 1939, despite the fact that he is not threatened with deportation to that country. The statute is not reasonably subject to such an interpretation.

As the Court of Appeals for the Ninth Circuit recently said in *Cheng Lee King* v. *Carnahan*, No. 15,415, decided March 24, 1958, slip opinion, p. 3:

> Literally the key words "unable to return to the country of his birth, or nationality, or last residence" are in the disjunctive. Literally King is entitled to relief if he can't go back because of fear of persecution on account of political opinion to the country of his birth or to the country of his nationality or to the country of his last residence.
>
> When the Congress was passing the act it was in a beneficent mood, but we cannot attribute to the Congress a construction, a meaning so broad as the literal. One must doubt that the Congress was in that beneficent a mood. The immigration service has interpreted the phrase in the conjunc-

tive. It holds that if the alien has two or three countries on his record of birth, nationality and last residence, then before he can establish the basis for change of status in the United States, he must be unable to return to any of the countries because of fear of persecution. Substantially the service is right.[3]

The Congressional purpose was to clarify the ambiguous status of those persons who were truly displaced persons and refugees. Congress could not have intended to extend relief to those whose place of birth was in some totalitarian country, but who had emigrated therefrom many years before and had established homes in other countries to which they could be returned with impunity. The political situation in the place of birth, as in the case at bar, has no relevance to the issue of whether the alien would be threatened with persecution if the order of deportation returning him to the country of his last residence were executed. His status in a country to which he does not intend, and is not being compelled, to return is a completely academic consideration.

That the congressional intent both in respect to Section 4 of the Displaced Persons Act, and Section 6 of the Refugee Relief Act was to afford relief to those whose sole ties were to countries to which they could return only at the risk of persecution, was evidenced

[3] The court there held that since that Chinese alien could not be returned to the country of his last residence, Singapore, for other reasons, the fact that he would not be persecuted in Singapore did not render him ineligible for relief as a person fearing persecution in China. Here petitioner can be returned to Italy where admittedly he does not fear persecution.

most recently when, during the second session of the 83d Congress, a bill (H.R. 8193) to amend the Refugee Relief Act was proposed. In pertinent part it would have required the alien to show inability "to return to the country of his birth, nationality, *and* last residence" (emphasis added). While this bill passed the House in this form, the original language of Section 6 was restored by the Senate and was ultimately adopted by Congress in the 1954 amendment to Section 6 (see Public Law No. 751, 83d Congress, 2d Session, 68 Stat. 1044). The Senate Report on the bill explains the rejection as follows (S. Rep. No. 2045, 83d Cong., 2d Sess., p. 5):

> The bill would amend section 6 of the Refugee Relief Act of 1953 relating to the adjustment of aliens in this country in a refugee status who are unable to return to the country of their birth, or nationality, or last residence, because of persecution or fear of persecution on acount of race, religion, or political opinion. . . . The committee has restored the language "birth, or nationality, or last residence," which is the language presently contained in section 6 of the Refugee Relief Act of 1953. The committee understands that this language has been construed by the Immigration and Naturalization Service to mean that if the applicant for adjustment is able *to return to any such country* without persecution or fear of persecution, he is not eligible for adjustment. Since the existing language, as construed, correctly expresses the intent of the section no purpose would be served by modifying the language as proposed in the bill. [Emphasis added.]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.